



February 24, 2017

***, Complainants

***, Superintendent

RE: **FINAL REPORT for** In the Matter of ***, 2016-09, Alleged Violations of the Individuals With Disabilities Education Act (IDEA).

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. *** (Complainants or Parents) filed the Complaint on behalf of their child, *** (Student), a student at *** (District). Complainants allege the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulation at 34 CFR Part 300 and ARM 10.16.3007 et seq. The District allegedly:

- (1). Failed to provide a free appropriate public education (FAPE) to student:
 - a. Complainants allege that they were not allowed to participate in the identification, evaluation and development of the IEP for their Student.
 - b. Complainants allege that IEP was not designed to address Student's specific needs and therefore, Student did not receive educational benefit.
 - c. Complainants allege that Student did not receive the services outlined on the IEP.
- (2). Failed to provide educational records promptly when requested by parents.
- (3). Failed to protect Student's privacy by improperly sharing Student's records.

A. Procedural History

1. On December 15, 2016, the Montana Office of Public Instruction (OPI) received an unsigned letter from the Complainants. That same day, a letter was sent to the Complainants indicating that the letter must be signed before it can be filed as a state complaint. ARM 10.16.3662. Additionally, on December 15, 2016 OPI's Early Assistance Program Director (EAP) called the Mother and discussed the requirement that the letter must be signed and offered to begin assisting in resolution of the concerns addressed in the letter.
2. On December 27, 2016, the OPI received a signed copy of the letter and it was deemed filed as state complaint.
3. On January 5, 2017, the Office of Public Instruction's EAP Director concluded the matters alleged in the Complaint were not able to be resolved through the EAP and the



OPI sent a Request for Written Response to the District. The Complaint proceeded to investigation.

4. The District's written response was received on January 16, 2017.
5. An appointed investigator attempted to interview the Complainants but the Complainants declined to be interviewed. In addition to the information in the Complaint, Complainants submitted a brief written response to the investigator. The investigator conducted interviews with the following District staff: the principal, first grade teacher, special education program specialist and special education coordinator.

B. Legal Framework

The OPI is authorized to address alleged violations of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR § 300.151-153 and ARM 10.16.3662, which occurred within one year prior to the date of the complaint. Pursuant to 34 CFR § 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination is made as to whether a violation of federal or state statute, regulation or rule occurred. Any references to facts outside of the one year timeframe, December 27, 2015 to December 27, 2016, are included strictly for background information.

C. Findings of Fact

1. Complainants have standing to file this Complaint pursuant to ARM 10.16.3661.
2. Student was not enrolled in the District at the time the Complaint was filed.
3. During kindergarten Student was enrolled in the District and received services under a developmental delay disability (DD) during the 2015-2016 school year. However, Student reached the age of six and was no longer eligible for the DD diagnosis. ARM 10.16.3010. A re-evaluation completed during the fall of the 2015-2016 school year determined that Student was eligible under the speech-language impairment disability category.
4. During the 2015-2016 school year, Student received speech-language services through a pull out program (in the special education setting) with other students for 40 minutes per week.
5. At Parents' request, services were individualized but were still provided outside of the general education classroom.



6. Over the course of the 2015-2016 school year, Student did not receive speech language services on thirteen occasions due to therapist absences because of assessment of other students, attendance at IEP meetings, scheduling errors and days off.
7. During the fall of the 2016-2017 school year, Student was in a first-grade classroom in the District and was struggling with foundational concepts in reading and math.
8. In addition to the regular classroom instruction, the classroom teacher provided various educational applications on the I-Pad to assist Student. Even with this assistance, Student was still struggling and the school was considering other interventions to assist Student.
9. In September 2016, both Parents came to the school on separate days to observe Student in the classroom.
10. The Parents were pleased with their Student's program and sent emails and gifts praising teacher for the innovative, creative ways she had assisted Student in the classroom.
11. At the beginning of the 2016-2017 school year, Parents, in an email to the principal, requested that Student not be pulled out any longer for speech because Student was receiving private speech services outside the school setting.
12. Since the Student's IEP included speech services, the District implemented a push in program for speech-language services for Student. Student received her special education services in the classroom rather than being pulled out for individualized instruction.
13. Approximately two weeks after Parents said they did not want Student pulled out for speech, they contacted the principal by email to inquire whether Student was pulled out for speech services. The principal explained the push in program and the Parents did not object to Student's inclusion in that program.
14. Parents became concerned about whether the classroom teacher had adequate time to work with Student and requested that an aide be hired to work 1-1 with Student.
15. The teacher contacted the principal about the request. An IEP meeting was scheduled within a few weeks and the topic of a 1-1 aide would be discussed at that time.
16. Student's IEP team held a meeting on October 12, 2016. At that meeting, Student's speech-language services were discussed and Parents had no objections or concerns about Student's speech-language services.
17. Student's progress notes demonstrated that Student had been making progress on speech-language goals.
18. Parents, however, requested that Student needed a 1-1 aide because of Student's academic difficulties.
19. District personnel explained that a 1-1 aide is a highly restrictive placement and multiple options needed to be considered before a 1-1 aide would be used. The District also



discussed a re-evaluation of Student because Student was still struggling with academics; the interventions that had been tried were not entirely successful and so further evaluation was recommended. The Parents would not agree to a re-evaluation.

20. Following the discussion of the 1-1 aide, Mother slapped her hand on the table and indicated that Student needed a 1-1 aide. Again, the District reiterated that other options must be considered first.
21. Mother inquired about whether she could volunteer in Student's classroom. The principal informed Mother that there was a process that needed to be followed if she volunteered and she could not be combative as a volunteer.
22. When Mother left the meeting shortly thereafter, to attend an appointment with her children, she was upset.
23. Father remained at the meeting and the recommended re-evaluation continued to be discussed.
24. At the end of the meeting, Father did not sign the IEP or agree to a re-evaluation, but wanted to take the proposed IEP home to discuss further with Mother.
25. The following day, Student was not in school because of a family emergency. The next day when Student was again absent, the school was contacted and informed that the Student would be home schooled. Arrangements were made to pick up Student's school supplies.
26. On October 17, 2016 the District sent Parents a letter including an offer of a FAPE (Free and Appropriate Public Education) to a parentally placed child with disabilities in private school.
27. Mother contacted the school on November 2, 2016 requesting all attendance records and the special education file for Student. These records were sent by certified mail on November 9, 2016. Parents did not pick up the certified mail and it was eventually returned to the school.
28. At the end of November, Father contacted the principal and stated that it was difficult for them to get to the post office to pick up certified mail and requested that a copy be left in the office and he would pick it up. Father picked up the records at the school on December 2, 2016.
29. Mother stated in her response to the investigator that the records received from the District included other student's personal information. The records that were sent were the Student's attendance records and special education file. This did not include other student's information.
30. The reply to the Complaint prepared by the District did include information from other students who attended District schools. There were comments about other students but no



names were included and there was no way to identify the student discussed. Parents received a copy of those attachments.

31. Parents also were concerned that a District employee was sharing Student's personal information. This was investigated by District personnel. The District employee was not assigned to Student's school until after Student began to be home schooled.
32. The District employee knew the family and the Student because she had a child in Student's classroom. Parents had earlier requested that this individual should work with their Student as an aide.
33. The results of the District's investigation into release of confidential information determined that there was no release of confidential information by this employee.
34. During the EAP process, the District offered to provide 400 minutes of comprehensive speech-language services.

Analysis and Conclusions

Issue 1: The District Failed to provide a free appropriate public education (FAPE) to student:

Students who are eligible for special education services are entitled to a FAPE. 34 CFR § 300.101. Districts are obligated to provide a FAPE to students within their District who are eligible for special education services. 34 CFR § 300.17. The type of services to be provided are determined by the IEP team. 34 CFR § 300.320. Parents are members of the IEP team. Parents of a child with a disability must have the opportunity to participate in IEP team meetings that make educational decisions on placement and services for their child. 34 CFR § 300.327. The well-recognized standard for whether a child has received a FAPE is whether the IEP is reasonably calculated to provide some educational benefit. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176, 197 (1982). The Rowley standard does not require an education that maximizes a student's potential, but only requires a "floor of opportunity." Id. See also J.L. v. Mercer Island, 592 F.3d 938, 951 (9th Cir. 2010). The proper standard to determine whether a student with a disability has received a FAPE, is the "educational benefit" standard.

The special education and related services on the IEP are individually determined based on the unique needs of the child. Rowley, 458 US 176, 197 (U.S. 1982). The IEP team is responsible for developing and implementing an IEP that is designed to provide a FAPE. FAPE includes special education and related services that:



- a. Are provided at public expense, under public supervision and direction, and without charge;
- b. Meet the standards of the SEA, including the requirements of this part;
- c. Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- d. Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 CFR §300.320 through 34 CFR § 300.324.

34 CFR § 300.17.

Special education means “specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability, including: 1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and 2) instruction in physical education.” 34 CFR § 300.39(a)(1). Each IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child –

To advance appropriately toward attaining the annual goals;

To be involved in and make progress in the general education curriculum in accordance with this section, and to participate in extracurricular and other nonacademic activities; and

To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

34 CFR § 300.320(a)(4).

a. Complainants allege that they were not allowed to participate in the identification, evaluation and development of the IEP for their Student.

Parents are an integral part of the special education process. Parents are members of the group that determines whether a child is a child with a disability and eligible for special education. 34 CFR § 306(a)(1). Additionally, parents are members of the IEP team. 34 CFR §300.321(a)(1) and 34 CFR § 300.322. Parental participation and input play a key role in the IEP process. Amanda J. V. Clark County School District, 267 F.3d 877, 890-891 (9th Cir. 2001).



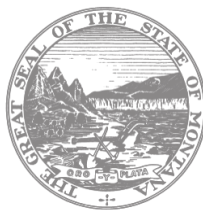
Parental participation includes an opportunity to express their concerns and propose suggestions for services. Deal v. Hamilton County Board of Education, 392 F3d 8840 (6th Cir. 2004) cert. denied, 546 U.S. 936 (2005), on remand, 46 IDELR 45 (E.D. Tenn. 2006), aff'd, 49 IDELR 123 (6th Cir. 2008); J.D. v. Kanawha County Board of Education, 48 IDELR 159, (S.D. W.Va. 2007), aff'd, 357 F. App. 515 (4th Cir. 2009), cert. denied, 131 S. Ct. 107 (2010) (failure to provide a 1-1 aide is not denial of FAPE). IDEA does not require districts to incorporate any and all suggestions of parents in the development of the IEP. Blackmon v. Springfield R-XII School District, 757 F3d 1173 (8th Cir. 1999). It must be receptive to the parents' concerns as vital members of the IEP team that are responsible for the development of the IEP. R.L. v. Miami-Dade County School Board, 198 F3d 648 (11th Cir. 2014). The intent during the development of the IEP is that the IEP team, which includes the parents, will reach consensus on the development of the Student's educational program. Letter to Richards, 55 IDELR 107 (OSEP 2010); Buser v. Corpus Christi Independent School District, 757 F3d 1173 (S.D. Tex. 1994). When there are disagreements about a student's educational plan, the parents may challenge the district's decision through the procedural safeguards provided under the IDEA, including mediation and the opportunity to present and resolve complaints through due process and state complaint procedures. 34 CFR § 300.504.

Parents came to the IEP meeting on October 12, 2016, seeking a 1-1 aide for their Student because of her academic difficulties. The hiring of a 1-1 aide was discussed at the meeting. The District proposed a re-evaluation to provide more information about Student's academic difficulties, to determine what additional special education services were necessary for Student. The use of a 1-1 aide was not rejected by the District, but was one of many options available to the IEP team to consider in order to meet the needs of Student.

Parents were allowed meaningful participation throughout the IEP process. Parental participation was not denied because the IEP team determined that a 1-1 aide was not appropriate at the time of the meeting. It appears from a review of the IEP and services provided that the IEP was designed to provide educational benefit for this particular Student. **Based on these facts and circumstances, Student was not denied a FAPE.**

b. Complainants allege that IEP was not designed to address Student's specific needs and therefore, Student did not receive educational benefit.

The IEP, as developed by the IEP team, outlines the programming and services provided for a free appropriate public education (FAPE). 34 CFR § 300.320(a). The IEP must consider the following when developing the IEP:



The strengths of the child;
The concerns of the parents for enhancing the education of their child;
The results of the initial or most recent evaluation of the child; and
The academic, developmental, and functional needs of the child.

34 CFR § 300.324(a)(1).

A student's placement is determined by the IEP team after the programming and services are determined by the IEP team. 34 CFR § 300.116(b)(2); 34 CFR § 300.327. Moreover, the IEP requires that the IEP team consider the least restrictive environment (LRE) available to provide a FAPE. LRE mandates that students be educated in regular classroom settings to the maximum extent appropriate. 34 CFR § 300.114(a); and OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994). The IDEA requires each public agency to ensure that:

1. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
2. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily.

34 CFR § 300.114(a).

Although the goal of the IEP team is to have the student educated in regular education settings, the setting may be more restrictive if that placement allows the child to receive "meaningful educational benefit." P. v. Newington Board of Education, 546 F3d 111 (2d Cir. 2008).

The IEP for Student provided for individualized speech and language services. At parents' request, Student was not pulled out of the classroom for speech services, but received services within the classroom. Additional interventions through the general education program were being implemented with Student, yet Student was still experiencing academic difficulties. Parents requested a 1-1 aide, which was discussed and rejected by the IEP team because additional information was necessary. A re-evaluation was requested to determine if Student was eligible for special education services in other areas and if additional services through special education and or special education and related services were warranted. Parents did not consent to the re-evaluation. Student was eligible as speech language impaired. She received speech-language services. At the October 12, 2016 IEP meeting, there were no concerns with the speech-language services that Student was receiving. At the time of the IEP,



Student was not eligible in any other area. A re-evaluation had been completed prior to the 2015 IEP and Student was determined eligible only in the area of speech and language. Progress notes indicate that Student was making progress on speech-language goals. Student was receiving educational benefit. Until the re-evaluation was completed, it was impossible to determine if student would need additional special education services through an IEP. **There were no violations of Part B on this record.**

c. Complainants allege that Student did not receive the services outlined on the IEP during the 2015-2016 school year.

Once the IEP is written, the District must implement the services as outlined on the IEP. 34 CFR § 300.323(c). Student's IEP for the 2015-2016 school year provided for 40 minutes of speech-language services per week. During the 2015-2016 school year, Student did not receive all the speech-language services outlined in the IEP. Specifically, during the timeframe of this state complaint, review of the speech therapy notes indicated student missed four sessions from December 27, 2015 to December 27, 2016 due to absences by the speech language clinician. Review of the notes from the entire 2015-2016 school year indicate this was an ongoing issue that extended prior to the timeframe of this Complaint. Student missed an additional nine sessions from the beginning of the school year until December 27, 2015 due to other commitments by the speech language clinician including assessments and observations of other students, IEP meetings, schedule errors or days off.

Based on the four missed sessions and review of the progress reports indicating Student had been making progress on speech-language goals, **there was no denial of a FAPE on this record. However, it is recommended due to the ongoing nature of the missed sessions throughout the 2015-2016 school year that the District offer to remediate the missed sessions.**

Offer for compensatory education. The District, during the EAP process, offered compensatory speech-language services to address the missed sessions. Complainants did not accept the offer or specifically reject the offer.

The District offered to provide Student 400 minutes over a ten-week period of compensatory education in speech and language pathology services by a District speech pathologist or another District approved contracted individual. If the Complainants want to accept the offer they must notify the District by March 15, 2017. The parties will then negotiate the provision of the services.

Issue 2: The District failed to provide educational records promptly when requested by parents.



The IDEA provides a number of procedural safeguards for parents. One of these safeguards is the opportunity to examine records and participate in meetings. 34 CFR § 300.501. As a part of the right of parents to participate in meetings, IDEA provides that parents have the right to inspect and review all educational records for their child that pertain to the identification, evaluation, educational placement, and the provision of a FAPE. 34 CFR § 300.501(a). See also 34 CFR § 99.10. These records include all records that are collected, maintained or used by the district in the implementation of IDEA for the particular child. These records must be provided in a timely manner, but no later than 45 days after the request has been made. 34 CFR § 300.613(a). A district may charge a reasonable fee for copies of the records if the fee does not effectively prevent the parents from exercising their right to inspect and review the records. 34 CFR § 300.617.

On November 2, 2016, Mother contacted the District and requested copies of attendance records and Student's special education file. These records were copied and sent by certified mail to the Parents within a few days. The Parents did not pick up the certified mail and it was sent back to the District. The Parents then requested that a copy be left at the school for Father to pick up. He picked up the requested records on December 2, 2016. There is no evidence on this record that Parents did not have access to educational records in the identification, evaluation of their child or in the development of the IEP. The records were sent to the Parents in a timely manner but it was their decision to not pick up the certified mail and instead request the records be left at the school. **There was no violation of Part B of IDEA.**

Issue 3: The District failed to protect Student's privacy by improperly sharing Student's records.

The Family Educational Rights and Privacy Act (FERPA) prohibits the districts from sharing personally identifiable information about a student maintained in a student's educational records without parental consent. 34 CFR, Part 99. School records and confidentiality of information must follow the provisions under FERPA (34 CFR, Part 99) and must follow the provisions established for special education under IDEA (34 CFR § 300.610 through § 300.626). ARM 10.16.3560. The district must maintain a log of requests for access to the educational records and release of personally identifiable information about a student within educational records maintained by the district. 34 CFR § 99.32(a)(1), 34 CFR § 300.614 and ARM 10.16.3560(3).



On this record, Parents requested a copy of Student's attendance records and special education file. That information was released to the parents in a timely manner.

The Parents also alleged that a District employee shared personally identifiable information about their Student without their consent. Following an investigation, the District determined that no information was shared with this employee, and, therefore, Student's educational records were not shared with others. The employee did not work at the school where the records were maintained until after the Student no longer attended that school. In addition, Parents had earlier requested that this employee be hired as an aide to their Student. In that regard, if and when parents share personally identifiable information, it is not a violation of a FERPA or IDEA.

Therefore, no violation under Part B of the IDEA was found.

d. Disposition

The Student was not denied a FAPE; there was no evidence on this record that Part B of IDEA was not followed. No corrective action by District is warranted.

Offer for Compensatory Education. Due to the ongoing nature of the missed speech and language sessions over the course of the 2015-2016 school year, the District offered to provide Student 400 minutes over a ten-week period of compensatory education in speech and language pathology services by a Billings Public Schools speech pathologist or another District approved contracted individual. If the Complainants want to accept the offer they must notify the District by **March 15, 2017.** The parties will then negotiate the provision of the services.

Frank Podobnik, Division Administrator
Special Education Division

c: Mandi Gibbs, Dispute Resolution/EAP Director
Dale Kimmet, School Improvement/Compliance Unit Manger
***, District Special Education Director